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R. v. J.W., 2025 ONCA 637

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. J.W., 2025 ONCA 637 [1]
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Paciocco, George and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

J.W.

Appellant

Alan D. Gold and Ellen C. Williams, for the appellant

Katherine Beaudoin, for the respondent

Heard: June 26, 2025

On appeal from the convictions entered by Justice Patricia Moore of the Superior Court of Justice, sitting with a jury, on October 11, 2023, and from the sentence imposed on August 6, 2024, with reasons reported at 2024 ONSC 4443.

Paciocco J.A.:

[1] This appeal is subject to a publication ban pursuant to s. 486.4 of the *Criminal Code*, R.S.C. 1985, c. C-46.

OVERVIEW

[1] J.W. was convicted after a jury trial of criminal offences involving the abuse of the complainant, who was his domestic partner at the time. He appeals his convictions alleging that the jury charge relating to myths and stereotypes was imbalanced and insufficient. He also submits that the jury instruction on the use of prior consistent statements made by the complainant was insufficient because it did not include an instruction not to rely on those statements as proof of the truth of their contents. Mr. W., who received a global sentence of six years' imprisonment, also seeks leave to appeal the five-year sentence he received on the sexual assault count. He claims that this sentence is excessive and was materially influenced by the trial judge's mistaken rejection of evidence of his good conduct in other domestic relationships, which he claims to be relevant in showing that the offences the jury found him to have committed were out of character.

[2] For the reasons that follow, I would dismiss his conviction appeal. I would grant him leave to appeal the sentence but dismiss his sentence appeal as well.

MATERIAL FACTS

[3] The spousal abuse Mr. W. was found to have committed occurred over an approximately two-year period, about ten years ago. Of the six counts on which he was convicted, one was for an assault causing bodily harm occurring in January 2014. Three of the counts related to a single incident in July 2015, in which Mr. W.

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was found to have forcibly confined the complainant before choking her to overcome resistance, and then sexually assaulting her by forcibly penetrating her both digitally and with his penis. The two remaining counts were rolled up charges each capable of capturing numerous incidents the complainant testified to. One of those rolled up charges was for common assaults occurring between November 30, 2013, and December 31, 2015, and one was for multiple acts of forcible confinement during the same period.

[4] The complainant said that the assaults escalated in severity and ultimately became a weekly occurrence, often including choking and punching. She said that this would happen if she yelled at Mr. W. or if he felt she had disrespected him. One of the alleged assaults involved a forceful kick to her stomach while she was pregnant with their son.

[5] The complainant testified that the police attended on multiple occasions as the result of disturbances, including immediately or shortly after some of the specific assaults she described in her testimony. She acknowledged making no allegations against Mr. W. during any of these police visits or follow up calls. She also said that for much of the period she was being abused she made no attempt to leave the relationship or to seek medical help, including after she was kicked in the stomach while pregnant.

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[6] The complainant testified that she took pictures of some of the injuries she sustained, and ten photos were put into evidence showing bruises to various parts of the body. Her face is not discernible in some of them. She also testified to surreptitiously recording a conversation with Mr. W., in which she made several allegations that Mr. W. abused her. In that audio-recorded statement, which was exhibited at trial, Mr. W. denies some of the allegations of abuse she confronted him with but responded to other allegations she was making with what the jury was entitled to find to be admissions that he abused her.

[7] In circumstances that were not fully explained, the complainant said that the parties signed a custody agreement dated May 11, 2015, which would have been before she said she left the relationship. She testified that she finally resolved to leave after the July 15, 2015 sexual assault, and that she then began to sleep outside of the shared home and move out her belongings.

[8] She said that Mr. W. assaulted her on three further occasions: (1) around the end of August 2015 when she visited the townhouse where they had been living, believing he would not be there; (2) on October 17, 2015, when they were together to discuss their son's baptism the next day, and (3) on December 29, 2015, at the townhouse she had moved into when he came by with a birthday present. She testified about an incident in late December 2017 when she was forcibly confined by Mr. W. during a disagreement they were having about custody and access to their son that arose after she refused to give Mr. W. an access visit

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because he was late. She said he made comments on that occasion denying that she had a right to custody of their son. The complainant testified that she tried making a police complaint by phone the following day but “was given the runaround”. She said that this final event prompted her to commence family law proceedings, which led to a court appearance on January 30, 2018. She then prepared a letter outlining abuse by Mr. W. that is dated February 28, 2018, which she provided to the police on April 19, 2018, leading to this prosecution.

[9] The complainant offered multiple explanations in her testimony for not reporting the assaults to the authorities and for not leaving sooner. She said that initially she was confused, thought she was at fault, and believed things would get better. After things escalated, she said she remained reluctant to break up the family and was afraid she would not be believed as Mr. W. knew police officers, including an officer he said was the deputy police chief. She said she was also terrified to leave Mr. W. because she had little money and no place to go and was concerned that the children would be taken away.

[10] The complainant acknowledged that after the police responded to several disturbance calls, she did not tell them that she had been abused and had told crisis response workers that she was fine. She also admitted denying to Children’s Aid Society workers that she had been abused after they became involved because of something her older son had told his teacher.

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[11] The complainant testified that she did tell her father and a resource centre counsellor about being abused and that she told her midwife about the kick to the stomach. She also testified that a neighbour intervened and sent Mr. W. away after the alleged December 29, 2015 assault, which occurred after she and Mr. W. had separated. No one who allegedly overheard, witnessed, or was told about any of the alleged assaults testified. The Crown's case relied solely upon the complainant's evidence, the photographs allegedly disclosing injuries on her body, some of which she linked to specific alleged incidents, and the audio-recording.

[12] Mr. W's trial counsel cross-examined the complainant extensively about inconsistencies between her testimony and the evidence she gave during the preliminary inquiry, as well as about her delay in disclosing the alleged abuse to the police. He secured admissions from her that she becomes hysterical and sometimes hits herself when she is angry. He suggested to her that she created false abuse allegations to assist her family law litigation, which was still underway at the time of the criminal trial, just as she had made the surreptitious audio-recording to extort a custody agreement from Mr. W. He also confronted her with her experience as a photographer and suggested that she manipulated the photos of her alleged injuries, some of which were not date-stamped. She denied manufacturing the allegations. He also confronted her with the fact that the audio-recording made no mention of the alleged sexual assault, and suggested that the evidence she gave that it was taped before that incident was false "tailored"

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testimony that sought to avoid the inference that if the sexual assault had happened, she would have mentioned it during the conversation.

[13] Mr. W. testified and denied all of the allegations. He claimed that his relationship with the complainant was fine for a short time but that she began to behave irrationally after she discovered that he had been speaking to another woman around January 2014. He testified that after that incident, she had frequent hysterical episodes, many linked to disputes about his fidelity. He said that she would hit herself and bang her head against the wall, yell loudly, and damage the house. He said that he would use force on occasion but only to prevent her from injuring herself or to restrain her. He testified he did not report her behaviour to the police who showed up during such episodes because she had threatened to make criminal allegations against him if he did so. For the same reason, he did not seek help, including after she attempted suicide. He said that he tried to persuade the complainant to leave for some time before she ultimately moved out.

[14] Mr. W. said that the custody agreement the complainant testified about was oral, not written, and it was not arrived at until after the separation, rather than in May 2015. No document was put into evidence.

[15] He claimed that the photographs of the complainant's injuries, which he had never seen before, did not look genuine, and he testified that he had seen her change photos on the computer in connection with her work as a wedding

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photographer. He said she bruises easily, and that he had observed injuries on her in the past from her falling.

[16] Mr. W. also denied that the audio-recording was surreptitiously recorded. He said that the complainant had told him she was making the recording, and that the conversation did not take place until around the time their relationship was ending in October 2015, which would have been after the alleged sexual assault occurred. He testified that some of the things he said during the conversation were not true, as he began telling her what she wanted to hear so he could get out of the relationship. He denied that he was admitting abuse. He said that instead he was acknowledging that he was wrong for cheating on her and trying to communicate that he was done with the relationship.

[17] It is on this evidence that the jury convicted Mr. W. The trial judge sentenced Mr. W. to a global sentence of six years' imprisonment. I will address the material jury submissions, the excerpts from the trial judge's jury charge, and the relevant excerpts from her sentencing decision in the context of the issues raised on appeal.

ISSUES

[18] Mr. W. appeals his convictions based on two challenges to the jury charge. He also seeks leave to appeal his sentence based on what I interpret to be two

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grounds of appeal. I would couch the issues on appeal, which were not stated in issue format by Mr. W., as follows:

A. Was the jury instruction relating to myths and stereotypes a misdirection, unbalanced, and/or insufficient?
B. Was the jury charge relating to prior consistent statements made by the complainant a non-direction amounting to a misdirection?
C. Was the sentence for the sexual assault conviction excessive or based on a misapprehension of the evidence?

MATERIAL PRINCIPLES RELATING TO JURY INSTRUCTIONS

[19] In *R. v. Abdullahi*, 2023 SCC 19, 428 C.C.C. (3d) 1, at para. 72, Rowe J. summarized the guidance he provided to appellate courts for reviewing jury instructions:

> [W]hen reviewing a jury charge for potential legal error, appellate courts should adopt a functional approach by reading the charge as a whole and determining whether the overall effect of the charge achieved its function: to properly equip the jury in the circumstances of the trial to decide the case according to the law and the evidence…. It is helpful to view a properly equipped jury as one that is both accurately and sufficiently instructed. The appellate court should consider if the jury had an accurate understanding of the law from what the judge said in the charge, bearing in mind that an instruction does not need to meet an idealized model, nor must it use prescribed wording. The appellate court should also consider if the judge erred by failing to give an instruction, either with sufficient detail or at all. While some instructions are mandatory and their omission will

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> constitute an error of law, whether other instructions are needed will be contingent on the circumstances of the case. Whenever an instruction is required, the judge needs to provide that instruction with sufficient detail for the jury to undertake its task. The circumstances of the trial cannot replace the judge's duty to ensure the jury is properly equipped, but they do inform what the jury needed to understand to decide the case.

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ANALYSIS

A. WAS THE JURY INSTRUCTION RELATING TO MYTHS AND STEREOTYPES A MISDIRECTION, UNBALANCED, AND/OR INSUFFICIENT?

[20] I agree that the jury charge relating to myths and stereotypes was not perfect. However, I am not persuaded that a reversible error occurred, and I would dismiss this ground of appeal. I will begin by describing the general legal principles that apply to myths and stereotypes.

The Material Principles

[21] "Myths and stereotypes … capture widely held ideas and beliefs that are not empirically true": *R. v. Kruk*, 2024 SCC 7, 433 C.C.C. (3d) 301, at para. 37. While the list of myths and stereotypes is not closed, there is a "circumscribed set of legal rules" identifying myths and stereotypes, based on their history, purpose, and character, that are linked to discrimination and inequality of treatment of complainants: *Kruk*, at paras. 45, 46, 49 and 64. Some myths and stereotypes "have now been jurisprudentially condemned as errors of law": *Kruk*, at para. 41.

It is an error of law for a trier of fact to rely on these myths or stereotypes to discredit complainants: *Kruk*, at para. 44; *R. v. A.B.A.*, 2019 ONCA 124, 145 O.R. (3d) 634, at para. 7, citing *R. v. A.R.D.*, 2017 ABCA 237, 353 C.C.C. (3d) 1 ("*A.R.D. (Alta. C.A.)*"), at paras. 6-9, aff'd *R. v. A.R.J.D.*, 2018 SCC 6, [2018] 1 S.C.R. 218 ("*A.R.J.D. (S.C.C.)*"). This is most likely to occur in sexual assault cases, but it is equally wrong to rely on myths and stereotypes in domestic assault cases: *Kruk*, at para. 69.

[22] In *Abdullahi*, Rowe J. distinguished between "[m]andatory instructions that must be dealt with in every case" and "[c]ontingent instructions … that may be required in some cases but not others": *Abdullahi*, at paras. 48-49. In my view, an instruction about myths or stereotypes is a contingent instruction. It need not be given in every case, but where there is a realistic possibility that jurors may rely upon a myth or stereotype recognized in law, the prohibition on relying on the myth or stereotype must be included in the judge's instruction to the jury: see *R. v. C.R.J.*, 2024 BCCA 308, at para. 89; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 64.

[23] It is important that judges not overstate or interpret prohibited myths and stereotypes too broadly, including when charging juries. Myths and stereotypes operate like many rules of evidence by prohibiting lines of reasoning but not proof of categories of fact. As Martin J. cautioned in *Kruk*, "[J]ust because the evidence happens to align with a myth or stereotype does not necessarily mean that any

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inferences that can be drawn from that evidence will be prejudicial": *Kruk*, at para. 65. She provided an instructive example at para. 65:

> While it is a myth that women regularly fabricate allegations of sexual assault, it is not an error to consider whether the circumstances of a particular case support the existence of a motive to fabricate — indeed, where the defence adduces evidence on this point, a trial judge is *obliged* to consider it to give full effect to the presumption of innocence, and a failure to do so constitutes reversible error. [Citations omitted; emphasis in original.]

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[24] There is no general rule presuming that evidence capable of supporting prohibited mythical reasoning will be inadmissible. As with any other evidence, so long as the evidence is relevant for a permissible purpose, it can be received. However, exceptionally, s. 276(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, makes evidence that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge presumptively inadmissible unless the accused shows, among other things, that it is not being adduced for the purpose of supporting one of the prohibited inferences identified in s. 276(1): *R. v. Kinamore*, 2025 SCC 19, 448 C.C.C. (3d) 427, at para. 30. Even in this context, the admission of such evidence is not absolutely prohibited. As Wagner, C.J. explained, at para. 81, "[i]n holding that sexual inactivity evidence is presumptively inadmissible, I reiterate that this evidence is not categorically excluded. The presumption only functions to eliminate discriminatory lines of reasoning." He went on to quote from Professor Lisa Dufraimont's article, "Myth,

Inference and Evidence in Sexual Assault Trials": "'[B]road conclusions that particular forms of evidence are irrelevant should be avoided … [M]yths and stereotypes about sexual assault are properly understood as prohibited inferences'": *Kinamore* at para. 81, citing Lisa Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials" (2019), 4:2 Queen's L.J. 316, at p. 346.

[25] The stereotypes at issue in the instant case relate to the complainant's delay in reporting, and her continued association with Mr. W. after many of the offences allegedly occurred. The underlying mythical or stereotypical reasoning that can occur when these factors are considered will arise if the trier of fact is judging "the complainant's credibility based solely on the correspondence between her behaviour and the expected behaviour of the stereotypical victim": *A.R.J.D. (S.C.C.)*, at para. 2. This kind of reasoning is impermissible because it is now understood that there is "no inviolable rule on how people who are the victims of trauma like a sexual assault will behave": *D.D.*, at para. 65. As a matter of principle, if a relevant inference arises that does not require reliance on this prohibited inference, it should be permitted.

Stereotype and the Delay in Reporting

[26] The leading case explaining the improper use of delay in reporting remains *D.D.* In that decision, Major J. both describes the prohibited inferences and makes

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clear that in some circumstances a delay in reporting may permissibly be considered. He made the following important observations, at paras. 63 and 65:

> The significance of the complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons … react to acts of sexual abuse.
>
> …
>
> A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant. [Citations omitted; emphasis in original.]

[27] It can be seen, then, that what is prohibited in a case where there has been a delay in reporting is starting from the "presumption" that a real victim would make a timely complaint, and then relying upon this stereotype to infer that since the complainant did not make a timely complaint, her complaint may not be credible: see *R. v. Lacombe*, 2019 ONCA 938, 383 C.C.C. (3d) 114, at para. 41, citing *R. v. Mills*, [1999] 3 S.C.R. 668, at p. 741. On the other hand, where there is an evidentiary foundation arising in the case at hand that logically links the timing of the complaint to a legitimate concern relevant to credibility, it is permissible to rely

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on the delay in reporting to draw that inference: *C.R.J.,* at para. 65; *R. v. S.G.*, 2022 ONCA 727, 85 C.R. (7th) 420, at para. 43; and *R. v. Coristine*, 2023 ONCA 517, at paras. 51-52; see also Lisa Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials" (2019), 44:2 Queen's L.J. 316 at pp. 345-46.

[28] The most widely encountered and available instance of a permissible inference arises where "the timing of disclosure supports a defence argument that the complainant had a motive to fabricate the events": *R. v. Greif*, 2021 BCCA 187, at para. 63, leave to appeal refused, [2021] S.C.C.A. No. 182 (emphasis added); see also *R. v. Esquivel-Benitez*, 2020 ONCA 160, 61 C.R. (7th) 326, at paras. 8-15. For example, in *R. v. S.C.* (2004), 188 O.A.C. 357 (C.A.), the delayed complaint against the accused coincided with a discussion the complainant had with her boyfriend who was upset about the accused having been at the home where she was babysitting. There may be other situations where evidence of delay is relevant. In *R. v. Brown* (2005), 201 C.C.C. (3d) 309 (Ont. C.A.), at para. 15, Sharpe J. recognized that a delay in reporting may be relevant where the complainant makes a complaint to the police without mentioning an allegation that is subsequently made only after a period of delay. The relevant inference – that the initial narrated complaint differs from and is therefore inconsistent with the delayed complaint – is not based on generalizations about the way victims would behave. It is based instead on a case-specific inconsistency by omission.

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[29] The bar against relying on delay in reporting is therefore commonly expressed in limited terms by stating that it is impermissible to reason that "delay in a complainant's disclosure …, alone, undermines the credibility of the disclosure": *Kruk*, at para. 41 (emphasis added). In *D.D.*, Major J. included among the features he recommended for jury charges an instruction that "[a] delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant": *D.D.*, at para. 65 (emphasis added). In recognition that delay may be relevant in the circumstances of the case based on permissible inferences, he also said that "[i]n assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case": *D.D.*, at para. 65 (emphasis added).

Stereotype and Continued Association

[30] Relatedly, it is impermissible for triers of fact to conclude that "a complainant associating with or not avoiding the accused after the alleged … assault suggests that … no assault occurred": *Kruk*, at para. 41. Some complainants avoid associating with their abusers, and others do not. Since there is no typical reaction for victims, it is erroneous to find relevance in the non-avoidant behaviour of the complainant by comparing that behaviour to the presumed or expected reaction of victims: *A.R.D. (Alta. C.A.),* at paras. 42-43, aff'd *A.R.J.D. (S.C.C.)*, at para. 2.

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[31] Since the impermissible inference arising from continued association is linked to the stereotype of how a real victim would behave, it should remain open, as a matter of principle, for accused persons to rely on evidence disclosing the absence of avoidant behaviour if the circumstances of the case support inferences that do not depend upon this stereotype. To take an obvious example, if a complainant testified that they avoided their abuser after the alleged assault, evidence that they did not do so would be relevant to their credibility since the relevance of this evidence would not depend upon the stereotype of how real victims behave. Although the factual details of the case are lacking, the case of *R. v. M. (W.W.)* (2006), 205 C.C.C. (3d) 410 (Ont. C.A.) may provide a further illustration. It appears in that case, this court found relevance in changes in the complainant's behaviour towards the appellant over time, leading up to the complaint: *M. (W.W.)*, at para. 8. In such circumstances, the relevant, permissible line of reasoning would not be based on the stereotype that a real victim would have avoided their abuser, but rather on the changes in the behaviour of the complainant towards the accused that occurred in the case at hand, and their timing.

[32] Based on these principles, Mr. W. took great exception in his submissions before us with an oft-quoted passage in *A.R.D. (Alta. C.A.)*, at para. 39, that he interpreted as holding that no reliance can be placed on the absence of avoidant behaviour, regardless of the circumstances of the case: "[W]hat, if anything, can

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evidence of a lack of avoidant behaviour by a complainant tell a trier of fact about a sexual assault allegation? The answer is simple—nothing." I do not read this passage so broadly. In *A.R.D. (Alta. C.A.)*, the issue before the Court was whether it was proper for a trial judge to rely on "what he presumed to be the 'expected' conduct of *a victim* of sexual abuse after an assault, and comparing the specific behaviour of the complainant to that expectation": *A.R.D. (Alta. C.A.)*, at para. 8 (emphasis in original). The answer to that question is of course "no". In my view, when para. 39 of *A.R.D. (Alta C.A.)* is read in context, the Court of Appeal of Alberta was simply and correctly stating that evidence of a lack of avoidant behaviour by a complainant, standing alone, tells a trier of fact nothing.

[33] It is with these principles in mind that I examine the jury instruction in this case.

The Charge and the Context

[34] In her opening instructions to the jury, the trial judge cautioned jurors about relying on preconceived beliefs about how victims of domestic violence and sexual assault would or should react. She told them there is no typical victim and she listed "misconceptions", including the stereotype that victims will report abuse immediately or avoid the person who hurt them after the event. The parties were alerted in advance by the trial judge that she would give this opening statement, and Mr. W's counsel expressed his agreement so long as jurors were also told that

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it is still up to them to decide her credibility based on the evidence they hear. The trial judge told jurors: “You must assess a witness’ credibility only on the evidence you receive without reliance on myths or stereotypes”.

[35] In their closing submissions, the parties made submissions about the delay in reporting. In his closing argument, Mr. W.’s trial counsel affirmed and endorsed the principle that jurors cannot rely on myths and stereotypes about how victims of crime act because victims do not act in “one certain way”, and he said, “[y]ou can’t say to yourselves, well, the mere fact she didn’t report until three years after means that it didn’t happen”. He then continued:

> [B]ut to go along with that, the fact that [the complainant] never spoke to the police until three years after the fact despite having many opportunities to do so, and the fact that the reports occur after a family court, most certainly can form a part of your deliberations as to whether or not you can believe [the complainant] beyond a reasonable doubt.

He returned to this theme later in his closing submissions, again noting that there is “no requirement of anyone to report anything” but affirming that jurors can “take into account the amount of times it could have been reported in these circumstances”. He also challenged the complainant’s explanation that she did not report because she was “scared” with evidence that on one occasion when the police arrived, she was observed wielding a bat and threatening to damage Mr. W.’s car. He also noted that on two occasions (presumably including the one just described) the police responded to reports of the complainant appearing to be

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the aggressor. And he again submitted that she complained to the police, only in 2018, because it served her family law proceeding to do so.

[36] The Crown asked the jury not to go down this path, emphasizing that people react very differently to traumatic events: “Just because somebody doesn’t leave a relationship doesn’t mean they weren’t beaten up”. He said that it is a myth that “if sexually assaulted, that you will fight it off immediately, that you will scream and cry for help, that you will go seek help right away, that you will give a statement to the police and point out your abuser”. He offered two examples to make the general point, suggesting different ways that people will react if they see a thief running from their home with a TV or if their flight is cancelled while they are at the airport. He submitted that the complainant’s explanation for why she went to the police – the confrontation during the visitation incident in late 2017 – “makes sense”.

[37] The Crown provided the trial judge with a recommended draft charge relating to myths and stereotypes which she read out loud during the pre-charge conference. Mr. W’s trial counsel expressed no objection to the charge but did ask the trial judge not to go further in cautioning jurors about myths and stereotypes because of the risk of “overdoing it” and causing jurors to think, “boy, there’s really something for defence to overcome ‘cause we can’t think about these stereotypes at all”. He agreed with the judge’s comment that the jury should be instructed “without tipping the scale”. The trial judge shared her final charge with counsel prior to the last day of trial. In response to being canvassed on the revised myths and

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stereotypes instruction, Mr. W's defence counsel responded: "I don't have a difficulty with that, Your Honour … I would imagine that we're both going to at least touch upon it in our closings anyway."

[38] In the charge she gave the jury, the trial judge reminded jurors of her opening remarks about unwarranted assumptions and there being "no typical victim or typical assailant or typical situation or typical reaction" and then said, "[m]y purpose in telling you that is not to support a particular conclusion, but to caution against reaching conclusions based on common misconceptions". She then gave jurors a general caution against "preconceived ideas", and continued:

> Unfortunately, myths and stereotypes regarding complainants in sexual assault and domestic violence cases still exist in our society and such myths and stereotypes are entirely unfounded and have no place in a court of law. Such myths and stereotypes should not be considered by you when deciding this case. A myth is a "widely held but false belief", and a stereotype is a "widely held but fixed and oversimplified image or idea of a particular type of person."
>
> In this case, you heard [the complainant] testify about being assaulted both sexually and physically during her relationship with Mr. [W.]. You also heard her say that she did not end the relationship immediately, did not try and avoid him, did not report the allegations during contact with the police and did not report the allegations to police at all until 2018. When assessing her testimony, it is important to avoid stereotypical reasoning in making determinations of credibility and reliability.
>
> Some stereotypes that might come into play in this case are the belief that all persons who are abused will immediately leave the relationship, and avoid the

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> perpetrator. This is simply not true. Some people may, but others will not. Similarly, there are myths or stereotypes in relation to not reporting sexual and domestic abuse immediately. Courts have recognized that there are no fixed rules about how people who are victims of trauma such as sexual or domestic violence will behave in the days, weeks or years either during or after the abuse. The reasons for delaying to report the abuse may include embarrassment, fear or guilt or lack of an understanding or knowledge. A delay in reporting, standing alone, should never give rise to an adverse inference against a complainant of sexual or domestic violence.
>
> You heard [the complainant] provide her reasons for not leaving the relationship or reporting the abuse including: believing it would get better, believing it was her fault and she just needed to act differently, because they had a child together, fear of being called crazy or a liar and not believed and losing her child, fear of being homeless with two children, and fear of the police. You should not make negative credibility findings against her on the stereotypical belief that "real" victims of abuse would leave or would report immediately. On the other hand, the fact that she remained and did not report does not bolster or enhance her credibility.

[39] Mr. W. raised no issue with the charge after it had been delivered.

The Submissions and Analysis

[40] Mr. W. now raises several issues with this jury instruction. Some of those arguments are predicated on a more general critique of the authority. He argued that "acting as if nothing happened is evidence that nothing happened" since, as a matter of logic, a person who has not been abused will have nothing to report, and no reason to leave. He submits that evidence that a complainant did not leave or

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report the abuse is therefore exculpatory evidence consistent with his innocence. Based on the theory that "acting as if nothing happened" is exculpatory, he submits that it is illogical and prejudicial to direct jurors that evidence of a lack of avoidant behaviour or lack of complaint tells a trier of fact nothing about a sexual assault allegation. He calls for a direction that would invite jurors to decide whether they are satisfied beyond a reasonable doubt that the sexual assault occurred, and the complainant remained silent about it for the reasons she explained, or whether they have "a reasonable doubt that she was silent because she had nothing to complain about". He made the following argument in his factum:

> The Charge to the Jury in its presentation of the prohibition against myths and stereotypes in relation to complainants in sex cases deprived the defence of the exculpatory impact of this complainant's extensive conduct supportive of the defence position that she was not in fact a victim of the crimes alleged.

[41] I strongly disagree with Mr. W's underlying premise that the mere absence of a timely complaint or the mere absence of avoidant behaviour such as leaving, should be treated as evidence of innocence. The simplest reason for rejecting this theory is that it is contrary to settled law that we are bound to follow. As I explained above in paras. 29 and 30, relying on delay in reporting or the absence of avoidant behaviour, standing alone, as proof of innocence is prohibited.

[42] This body of law is not logically problematic, as Mr. W. suggests. I accept that a failure to complain or to engage in avoidant behaviour is consistent with

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nothing having happened, but these same behaviours are also exhibited by many victims. It is therefore impossible to rely on either of these behaviours, standing alone, as a logical basis for distinguishing between those who have been victimized and those who have not. Since these behaviours, standing alone, are uninstructive in distinguishing between truthful and false allegations, they lack probative value on the issue of guilt. Evidence that does not logically distinguish the innocent from the guilty is not exculpatory. I therefore reject Mr. W.'s submission that the trial judge deprived Mr. W. of exculpatory evidence when describing the prohibited lines of reasoning. And she did not err in prohibiting jurors from engaging in such reasoning. She was compelled by law to do so.

[43] Mr. W. also argued that the trial judge misdirected jurors by telling them, in substance, that they could not use the evidence of delayed disclosure or the history of the police complaints in assessing the complainant's credibility. Relatedly, he argued that the jury charge was insufficient because it failed to equip jurors to reason properly, and the charge was unbalanced. He bases these submissions, in part, on the fact that the jury instruction focused only on impermissible inferences, not permissible ones that arose.

[44] I agree with Mr. W. that there were permissible inferences in this case arising from the delay in reporting and the manner in which the complaints emerged. First, the timing of the disclosure – coinciding with the commencement of the family law litigation between the parties – bears on whether the complainant manufactured

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the allegations to assist in that litigation. This line of reasoning does not depend on stereotypical reasoning, and on appeal the Crown does not suggest otherwise. Second, the complainant did not simply fail to complain; she told Children's Aid Society workers and crisis response workers that no criminal conduct occurred and that she was fine. She arguably made other prior inconsistent statements to the police.[2] Any such prior inconsistent statements, even though part of the narrative of the history of the complaint, are also relevant to her credibility based on permissible reasoning. If the trial judge had directed jurors not to consider these inferences, that would have been a misdirection. I am not persuaded that she did so.

[45] First, at no point did she tell jurors that they could not use this evidence at all, and she did not say that delays in reporting or the manner of disclosure tell us nothing about the credibility of the complainant. Instead, she directed jurors appropriately to avoid stereotypical reasoning, and not to make "negative credibility findings against [the complainant] on the stereotypical belief that 'real' victims of abuse would leave or would report immediately". She also paraphrased from *D.D.,* instructing that "a delay in reporting, standing alone, should never give rise to an adverse inference against a complainant of sexual or domestic violence"

[2] The complainant was confronted with statements attributed to her in police occurrence reports arising from some of the police visits that are arguably inconsistent with the narrative of events she provided in her testimony, but the extent to which she adopted those alleged statements, or they were otherwise proved, is debatable.

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(emphasis added). These directions against misusing evidence relating to the delay in or manner of reporting were correct.

[46] Second, when the charge is read in its entirety, it would have been apparent to jurors that it was open to them to draw non-stereotypical inferences arising from delayed disclosure or the history of the complaints. Although it is a matter of some subtlety, the direction not to use delay in reporting “standing alone” implies that inferences may be drawn if the evidence of delay does not “stand alone”. More importantly, the trial judge also listed the explanations that the complainant provided for not leaving or reporting. There would have been no point in her doing so if delay and the history of the complaints were entirely off limits. By drawing these explanations to the attention of jurors she was clearly inviting the jury to evaluate them.

[47] In my view, jurors were not misdirected. The trial judge did not tell them, either directly or in substance, that they could not draw the permissible inferences I have identified. The question remains whether the charge was unbalanced or insufficient to equip jurors to apply the law, given what the trial judge did not say. I am not persuaded that it was either unbalanced or insufficient, even though I accept that the charge was not perfect. I will begin with those imperfections.

[48] First, at no point in the charge did the trial judge tell jurors explicitly that so long as they avoided impermissible inferences, they could consider the timing of

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the complaint in assessing the credibility of the complainant. At para. 65 in *D.D.,* Major J. envisaged trial judges instructing jurors that:

> Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant. [Emphasis added.]

[49] The charge the trial judge gave, which she commented was "almost the exact wording from *D.D."*, omitted the underlined sentence, which was an important part in the proposed charge in *D.D.* As I pointed out in para. 29 above, it is this sentence that makes clear to jurors that they are not absolutely prohibited from relying on delay in assessing credibility. To underscore the point, in several cases this court has relied upon the inclusion in a jury charge of the principles found in the passage in *D.D.* to find otherwise imperfect charges to be functional and therefore sufficient: *R. v. B. (R.)* (2005), 77 O.R. (3d) 171 (C.A.), at paras. 29-31, leave to appeal to S.C.C. refused, 31101 (February 16, 2006); *R. v. Marshall*, 2017 ONCA 1013, at paras. 19, 21, leave to appeal refused, [2019] S.C.C.A. No. 238; and *R. v. A.W.B.*, 2015 ONCA 185, 322 C.C.C. (3d) 130, at para. 46; see also *S.C.*, at para. 5. Yet the key passage that I have underlined above is missing from the charge the trial judge provided. Certainly, the charge should have either included this passage or otherwise communicated explicitly that so long as jurors

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avoid stereotypical reasoning, they are not absolutely prohibited from relying on delay or the pattern of disclosure in assessing the complainant's credibility.

[50] Second, when she gave the charge on myths and stereotypes, the trial judge did not identify the permissible lines of reasoning that were available in this case. Again, ideally, she should have done so to ensure comprehension.

[51] There is therefore merit in Mr. W.'s complaint that the charge focused on what not to do with the evidence, while failing to give equal attention to what could be done with the evidence. I am nonetheless persuaded that, in the context of the evidence, the arguments, and the balance of the charge, jurors would have understood the permissible inferences, and that they were permitted to draw them. This, in my mind, is the critical consideration in determining whether this ground of appeal should be allowed: see *A.W.B.*, at para. 46; *Brown,* at para. 17; *C.R.J.*, at paras. 88-99; and *Marshall*, at para. 19.

[52] In my view, jurors would have been aware from the conduct of the trial that they could and should consider whether the delay in reporting until the family law proceedings were underway supported the motive theory of the defence, and whether prior inconsistent statements undermined the complainant's credibility. Mr. W. pursued these themes during the trial without ambiguity. His trial counsel's examinations and closing submissions featured these considerations without objection and without any expression of judicial disapproval. Indeed, defence

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counsel twice told jurors that it was appropriate for them to consider the way the complaint unfolded, notwithstanding the myth and stereotype direction, and he was not stopped when doing so or contradicted by either the Crown or the trial judge.

[53] Any residual concern about whether jurors would have understood that they could draw the inferences that Mr. W. was inviting is entirely removed by the balance of the jury charge. Although the trial judge did not address the motive theory in the part of her charge dealing with myths and stereotypes, twice in her charge she mentioned the defence theory that the complainant made up these allegations. When she summarized the defence position she related that theory explicitly to the timing of the complaint: “it was not until family court proceedings began three years later that [the complainant] made the allegations before the court”. Elsewhere in the charge the trial judge instructed jurors on the use of prior inconsistent statements. While she did not specifically identify the complainant’s contemporaneous statements to Children’s Aid Society workers, crisis response workers, and police as examples of prior inconsistent statements, she did provide an accurate general instruction: “If you find that a witness said one thing in the box and something different about the same subject on an earlier occasion, this may be a factor in assessing the witness's credibility.” In my view, it would have been obvious to jurors that they could consider prior inconsistent statements arising from the contacts with the police and social service agencies notwithstanding the myth and stereotype direction.

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[54] There is one further consideration. Mr. W's trial counsel, who had reviewed the charge, did not raise any issue with it. I appreciate that the obligation to provide correct charges rests with trial judges, and that a failure to object is not always a material consideration, as it may reflect no more than an oversight on counsel's part to note the problem: *Abdullahi*, at para. 67; *R. v. W.E.G.*, 2021 ONCA 365, 73 C.R. (7th) 141, at para. 32; and *R. v. Scordino*, 2025 ONCA 12, 72 O.R. (3d) 113, at para. 65. This, however, is a case where it is appropriate to infer that trial counsel did not object because he did not view the charge as problematic. He knew that he was entitled to have the jury consider the delay on the issue of credibility because he told jurors they could do so twice in his closing submissions. Yet he took no issue with the draft charge, or with the charge that was given. He was evidently content with what was said, including the direction to decide the case on the evidence.

[55] I would therefore deny this ground of appeal. As I have explained, I am not persuaded that the trial judge misdirected jurors on the law, and although there are imperfections in the myths and stereotypes charge, when the trial and charge are considered as a whole, jurors had a functional and balanced understanding of how to decide the case according to the law.

[56] Having said this, I would encourage judges to avoid thinking of the charges they give relating to myths and stereotypes as being exclusively about prohibited inferences. It is optimal to explicitly address the permitted inferences while

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impermissible inferences are being described. It will make things simpler for jurors and avoid any realistic risk of confusion by explaining the law and then identifying with specificity the permissible inferences that arise. I recognize that concision is a virtue, but these recommendations should not burden the charge.

B. WAS THE JURY CHARGE RELATING TO PRIOR CONSISTENT STATEMENTS MADE BY THE COMPLAINANT A NON-DIRECTION AMOUNTING TO A MISDIRECTION?

[57] In the audio-recording that was admitted, the complainant confronted Mr. W. with allegations of abuse, which she repeated in her testimony. During her testimony, she also referenced reading a personal journal to refresh her memory about the dates of specific incidents and repeated those dates in her description of events. Those statements by her were therefore “prior consistent statements”. Prior consistent statements are *prima facie* inadmissible: *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at para. 5. First, statements made other than while testifying in the trial are hearsay and cannot be relied upon for the truth of their content unless a hearsay exception applies (the “hearsay element”). Second, the fact that a prior consistent statement was made (the “declaration element”) is not generally relevant because prior consistent statements are redundant to the testimony they are consistent with, and the repetition of the same claim is neither independent corroboration of that claim (coming as it does from the same source) nor an indication that the claim is accurate (given that even a lie or mistake can be

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repeated): *R. v. Khan*, 2017 ONCA 114, 136 O.R. (3d) 520, at paras. 25-26, leave to appeal refused, [2017] S.C.C.A. No. 139.

[58] No issue is taken before us with the admission of the prior consistent statements in this case. It was necessary to admit the prior consistent statements made by the complainant in the audio-recording to give meaning and context to the admissible statements Mr. W. made in response to what the complainant was saying. The journal was relevant in explaining why the complainant's testimony had changed after the preliminary inquiry as the result of consulting the journal. Both categories of prior consistent statements came in under the limited exception for "narrative" evidence.

[59] However, Mr. W. argues that the jury instruction given by the trial judge was insufficient. He focuses that submission on the audio-recording, which contains the prior consistent statements of most concern to him. When a prior consistent statement has been admitted, a clear warning by a trial judge is almost always required to reduce the risk that a jury will use it for a prohibited purpose: *R. v. Ellard*, 2009 SCC 27, [2009] 2 S.C.R. 19, at para. 42; *R. v. Burkhard,* 2024 ONCA 353, 437 C.C.C. (3d) 238, at para. 18.

[60] Mr. W. contends that the trial judge's jury instruction was incomplete. He does not take issue with whether the trial judge described the permissible use of the prior consistent statements in the audio-recording; she did so, by

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communicating to jurors that they could rely on Mr. W's responses to what the complainant said as evidence. Mr. W. concedes that the trial judge also correctly told jurors in a mid-trial instruction that they may not use the fact that she said things in the audio-recording and wrote things in her journal that are consistent with her testimony to bolster her credibility. The trial judge explained this limitation in the mid-trial instruction and summarized it again in her jury charge. In the mid-trial instruction, she said:

> This rule is based on the premise that just because a person has said the same thing about the same event more than once … does not make it more likely to be true. Repetition and accuracy or truthfulness are not the same thing.
>
> …
>
> Therefore, you must not use any statements of [the complainant] in the audio recording or comments about her journal about the same events as evidence much less proof of what actually happened.

[61] The concern that Mr. W. raises is that, in his view, the trial judge failed to direct jurors about the "hearsay element" danger. He argues that the trial judge should have told jurors that they must not use the prior consistent statements as evidence of the truth of what the complainant said. He relies on Watt's Model Jury Instruction on prior consistent statements of non-accused persons to further his point: David Watt, *Watt's Manual of Criminal Jury Instructions* (Toronto: Thomson Reuters, 2024), at p. 383 (Final 35-D, at para. 4).

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[62] I would not give effect to this ground of appeal. Although the trial judge did not explicitly tell jurors in her final charge that they could not use the prior statements as evidence of the truth of what the complainant said, she told jurors in her mid-trial instruction not to use those statements as evidence. She then punctuated the point by adding, “much less proof of what actually happened”. This last phrase, which jurors would have had to ignore to use the prior consistent statements as proof of the truth of what the complainant said, was evidently borrowed from Watt’s Model charge. The trial judge then reminded jurors of this mid-trial instruction in her final charge. She may not have used the exact words of the model charge in its entirety, but she did not have to. Although it would have been preferable if this mid-trial instruction was repeated in the final charge, the trial judge gave what was required – a functional charge that would equip jurors to apply the law by avoiding the use of the prior consistent statements for a hearsay purpose.

[63] I would deny this ground of appeal.

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C. WAS THE SENTENCE FOR THE SEXUAL ASSAULT CONVICTION EXCESSIVE OR BASED ON A MISAPPREHENSION OF THE EVIDENCE?

[64] We owe significant deference to the sentencing decisions of trial judges: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 11, 52. I see no basis for interfering with the sentence the trial judge imposed.

[65] Although it was long, the five-year sentence for the sexual assault was not demonstrably unfit. “[T]he range for sexual assault involving forced penetration is 3-5 years in the penitentiary”: *R. v. R.S.*, 2023 ONCA 608, 168 O.R. (3d) 641, at para. 22; *R. v. A.J.K.*, 2022 ONCA 487, 162 O.R. (3d) 721, at para. 77. Judges, of course, are not bound by sentencing ranges, but ranges are illustrative, and the sexual assault that occurred in this case was deserving of a sentence at the high end of the range, bearing in mind both the offence and the offender. The sexual assault was a demeaning act of domination involving a violent, sustained, and intrusive attack on the complainant. The offence was aggravated by the fact that the complainant was dragged to the bedroom, unlawfully confined, and choked, for which Mr. W. received sentences concurrent with this five-year penalty. It is difficult to isolate the impact that this event had on the complainant, but she was profoundly and adversely affected by the ongoing abuse she endured, including in this especially significant violation. Not only was the offence itself at the high end of seriousness, but Mr. W. carried a high degree of moral blame for committing it

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because he sought to exercise control and domination over the complainant through his repeated abuse. I would not interfere with the trial judge's discretion in reaching for the upper range of incarceration in these circumstances, even after considering the principle of totality and that Mr. W. is a first-time offender with no prior criminal record who has family and community support.

[66] I am equally unpersuaded that the trial judge made an error of principle that impacted this sentence by putting little weight on, or misapprehending, the evidence that Mr. W. had pro-social and non-violent relationships with two other domestic partners, including his domestic partner at the time of sentencing. The weight given to a sentencing factor is not a basis for interfering unless the judge exercises their discretion unreasonably: *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 26; *R. v. Simeunovich*, 2023 ONCA 562, 168 O.R. (3d) 632, at para. 13, leave to appeal refused, [2024] S.C.C.A. No. 48. The trial judge's treatment of this evidence was not unreasonable. Mr. W. was convicted of numerous criminal acts of spousal abuse, including extreme acts, over a two-year period. The fact that he conducted himself appropriately in two other domestic relationships does not speak loudly, in this context, of his good character. The trial judge was entitled to find that this factor, along with the other pro-social features she considered, did not support a shorter sentence.

[67] There is also merit in the trial judge's observation that when being sentenced for abusing one person, the fact that the offender did not abuse others is not a

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mitigating factor, but rather the absence of an aggravating one: see *Friesen*, at para. 150. And I do not fault the trial judge for saying that Mr. W.'s reliance on his other good relationships had an air of victim-blaming. In the audio-recording, Mr. W. clearly employed a victim-blaming strategy in putting down the complainant and the trial judge's comment would have given the complainant solace after hearing a submission that Mr. W. did not resort to violence in his other domestic relationships. I do not interpret this comment as an indication that the trial judge misapprehended the purpose of this evidence. She addressed its potential as a mitigating factor directly in her reasoning.

[68] I would grant the appellant leave to appeal the sentence, but I would deny both grounds of his sentence appeal.

CONCLUSION

[69] I would dismiss the conviction appeal, and grant leave to appeal the sentence, but dismiss that appeal as well.

Released: September 15, 2025 "D.M.P."

"David M. Paciocco J.A."
"I agree. J. George J.A."
"I agree. L. Favreau J.A."

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